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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. .....

ANHEUSER-BUSCH, INCORPORATED, a Corporation, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent.

MELROSE ICE CREAM CORPORATION, a Dissolved Corporation, and ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the Last Board of Directors and Trustees for the Creditors and Stockholders of Said Melrose Ice Cream Corporation, Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent.

Consolidated Causes.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Anheuser-Busch, Incorporated, a corporation, Melrose Ice Cream Corporation, a dissolved corporation, Adolphus Busch III, Charles D. Russell, Gus G. Kinder-

vater, and William J. Landes, Surviving Members of the last Board of Directors, and Trustees for the creditors and stockholders of said Melrose Ice Cream Corporation, respectfully pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the consolidated cases styled, "Anheuser-Busch, Incorporated, Petitioner, v. Guy T. Helvering, Commissioner of Internal Revenue, Respondent," being Cause No. 11,751 on the docket of said Circuit Court of Appeals, and "Melrose Ice Cream Corporation, a dissolved corporation, et al., Petitioners, v. Guy T. Helvering, Commissioner of Internal Revenue, Respondent," being Cause No. 11,752 on the docket of said Circuit Court of Appeals, which judgment, entered on November 27, 1940 (R. 269), affirmed a decision (order of redetermination) of the United States Board of Tax Appeals entered February 10, 1940 (R. 167), deciding that there was a deficiency in income taxes due from the Petitioners jointly for the year 1930, in the amount of $87,022.87. A petition for rehearing filed on December 12, 1940, was entertained by said Circuit Court of Appeals, and denied on December 19, 1940 (R. 285). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1935, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347).

QUESTIONS PRESENTED.

Anheuser-Busch, Incorporated, agreed to cause all the assets of its wholly owned subsidiary, "Anheuser-Busch Ice and Cold Storage Company, Incorporated," a New York corporation, later styled "Melrose Ice Cream Corporation," to be conveyed to The Borden Company in exchange for stock in The Borden Company and the assumption by The Borden Company of the liabilities of said subsidiary, including a liability of such subsidiary to Anheuser-Busch, Incorpo-

rated, in the amount of $500,000.00. Pursuant to said agreement said New York corporation conveyed all of its assets to The Borden Company in exchange for stock in The Borden Company. Immediately after such exchange, The Borden Company conveyed the assets received by it to its own subsidiary, a Delaware Corporation, in exchange for its stock. Such second conveyance was not required by any agreement to which Anheuser-Busch, Incorporated, or its subsidiary, was a party, but was an act the performance of which lay within the exclusive discretion and control of The Borden Company.

1. The primary question presented is: Whether the shares of stock of The Borden Company issued in exchange for the assets of the New York corporation were securities of a party to a reorganization so as to be received free from recognition of gain under the provisions of Section 112 of the Revenue Act of 1928.

2. A question involved in the solution of the primary question is: Whether the ownership of the assets by The Borden Company, although unencumbered by any obligation of The Borden Company to taxpayers in respect of the retention or subsequent disposal of such assets, may be considered as "transitory and without real substance."

3. A further question involved in the solution of the primary question is: Whether the exchange of the assets of the New York corporation for stock of The Borden Company, which it is conceded would, if considered alone, have constituted a tax-free reorganization under Section 112 (b) (4) of the Revenue Act of 1928, was deprived of that character by a subsequent conveyance of such assets by The Borden Company to its own subsidiary, although The Borden Company was under no obligation to taxpayers to make such second conveyance.

4. A secondary question, depending for its solution upon the solution of the primary question (1), is: Whether, under subsection (f) of Section 213 of the Revenue Act of 1939, the assumpton by The Borden Company of the indebtedness of the New York corporation to Anheuser-Busch, Incorporated, is to be considered as "other property or money" so as to result, under Section 112 of the Revenue Act of 1928, in the recognition of taxable gain to the extent of such assumption.

STATUTES INVOLVED.

The following statutes are involved in this proceeding: Section 112 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, § 112, 45 Stat. 816):

> "Sec. 112 (a) *General rule.* Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.
>
> "(b) *Exchanges solely in kind.*
>
> * * * * * * *
>
> "(4) *Same—gain of corporation.* No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.
>
> * * * * * * *
>
> "(c) *Gain from exchanges not solely in kind.*
>
> * * * * * * *
>
> "(d) *Same—Gain of corporation.* If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * * * *

(i) *Definition of reorganization.* As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * * * *"

Section 213 (f) of the Revenue Act of 1939 [Act of June 29, 1939, c. 247, Title II, § 213 (f), 53 Stat. 871]:

"Sec. 213 (f). *Assumption of Liability Not Recognized Under Prior Acts—*

"(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as part of the consideration property which would be permitted by subsection (b) (4) or (5) of section 112 of

the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as 'other property or money' received by the taxpayer within the meaning of subsection (c), (d) or (e) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts; except that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the nineteenth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

"(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent revenue Acts as of the date of enactment of each such Act."

SUMMARY STATEMENT OF MATTER INVOLVED.

These cases were submitted to the Board of Tax Appeals upon a stipulation of facts (R. 47 et seq.), and the stipulated facts were found by the Board. They may be summarized as follows:

> [Note: record references to stipulation and exhibits thereto are in ordinary type; record references to Board's summary of facts are in italics.]

Anheuser-Busch Ice and Cold Storage Company, Inc. (hereinafter referred to as the "New York Corporation") was a corporation organized under the laws of the State of New York in 1905 under the corporate name "Anheuser-Busch Agency." In 1920 it had assumed the corporate name "Anheuser-Busch Ice and Cold Storage Company, Inc." and on September 20, 1930, it changed its corporate name to "Melrose Ice Cream Corporation" [Stip. § 1, R. 48, *R. 156*]. The business of the New York Corporation, until September 26, 1930, was the manufacture and sale of ice and ice cream, and the operation of a cold storage business [Stip. § 5, R. 50, *R. 156*]. All of the capital stock of the New York Corporation was beneficially owned by Anheuser-Busch, Incorporated, a Missouri corporation [Stip. § 4, R. 49, *R. 156*].

For the purpose of enabling the New York Corporation to increase its facilities for manufacturing and delivering ice cream by the construction of new buildings, by the installation therein of machinery, and by the acquisition of adequate delivery equipment, Anheuser-Busch, Incorporated, commencing in December of 1928, made loans to the New York Corporation for the aggregate amount of $650,000.00 [Stip. § 5, R. 50, *R. 156*]. Such indebtedness was evidenced by promissory notes for that amount, made payable to the order of Anheuser-Busch, Incorporated, with interest at the rate of 5½ per cent per annum, which were carried on the general ledger accounts of Anheuser-Busch,

Incorporated, as "bills receivable" [Pet. Ex. 6, R. 77, *R. 156*]. On August 6, 1930, and September 26, 1930, the principal amount of $500,000.00 remained unpaid on such notes [Stip. § 5, R. 50, *R. 156*].

In August of 1930 an agreement was entered into between Anheuser-Busch, Incorporated, and The Borden Company. Such agreement was evidenced by a proposal letter, dated August 6, 1930, addressed to Anheuser-Busch, Incorporated, and signed by The Borden Company [Stip. § 6, R. 51, Pet. Ex. 7, R. 79, *R. 156*] and a written acceptance thereof dated August 26, 1930 [R. 91].

In the letter of August 6, 1930, The Borden Company proposed that Anheuser-Busch, Incorporated, effect a reorganization of the New York Corporation, in pursuance whereof the New York Corporation should convey all of its assets to The Borden Company, and The Borden Company should, in exchange for such assets, issue to the New York Corporation, or upon its order, 35,000 shares of The Borden Company's stock and assume and agree to pay all of the liabilities of the New York Corporation, excepting its capital stock liability, and certain tax liabilities and expenses not material here [R. 80, *R. 156-157*]. It was specifically provided that, in assuming the liabilities of the New York Corporation, the principal of its notes, for the sum of $500,000.00, held by Anheuser-Busch, Incorporated, should be paid as to the sum of $300,000.00 in cash, and as to the sum of $200,000.00 by the issuance to Anheuser-Busch, Incorporated, of 2,500 shares of the stock of The Borden Company [R. 81, *R. 157*].

Other provisions of the proposal letter related to certain warranties as to the correctness of financial statements, valuations, tax liabilities, and comparable matters, including an agreement not to compete in business [R. 82-86, *R. 158*].

The proposal letter further provided that the corporate name of the New York Corporation should be changed and

recited that it was the intent of such provision that The Borden Company should "be at liberty" to organize a new corporation under a name, including the words "Anheuser-Busch," for the purpose of taking over and continuing the business then owned and operated by the New York Corporation, and that Anheuser-Busch, Incorporated, should co-operate, at the request of The Borden Company, in permitting the organization or qualification of such new corporation [R. 86-87, *R. 158*].

No provision of the proposal letter defined the capitalization of such "new corporation," or specified the assets to be taken over by it, or fixed the consideration or terms upon which they were to be taken over, or obligated The Borden Company to make any conveyance of any assets.

The transaction was to be closed on September 16, 1930, as of March 31, 1930, from which time the business was to be carried on for the account of The Borden Company [R. 88, 90, *R. 159*]. After closing of the transaction, the New York Corporation was to be dissolved and completely liquidated [R. 88, *R. 159*].

Prior to the date of the execution, delivery and acceptance of the proposal letter of August 6, 1930, the Board of Directors of Anheuser-Busch, Incorporated, at a meeting held on July 29, 1930, had authorized an agreement with The Borden Company for the reorganization of the New York Corporation, whereby The Borden Company was to acquire all of the property of the New York Corporation, subject to its liabilities, in exchange for 35,000 shares of the capital stock of The Borden Company, and The Borden Company, in assuming such liabilities, was to liquidate the $500,000.00 indebtedness previously referred to by the payment of $300,000.00 in cash, and by the issuance to Anheuser-Busch, Incorporated, of 2,500 shares of stock in The Borden Company [Pet. Ex. 10, R. 105, *R. 159*]. The reorganization transaction was also duly authorized by the Board of Directors and stockholders of

the New York Corporation at meetings convened on September 10, 1930, and adjourned and reconvened on September 16, 1930 [Pet. Exs. 8 and 9, R. 92-99, 99-105, *R. 159*], and by the Board of Directors of The Borden Company at a meeting held August 5, 1930 [Pet. Ex. 11, R. 107, *R. 159*].

On September 26, 1930, the New York Corporation executed and delivered to The Borden Company a document styled "Bill of Sale and Assumption of Liabilities" [Pet. Ex. 12, R. 112], whereby for a recited consideration, including 35,000 shares of the capital stock of The Borden Company, and the assumption of its liabilities (subject to the exceptions set forth in the proposal letter), the New York Corporation conveyed, assigned and transferred to The Borden Company, as of March 31, 1930, all of its property and assets and its business as a going concern (*R. 159*). The Bill of Sale recited that it was the intention of the parties that separate deeds should be executed and delivered for the real estate conveyed, and should be delivered by the New York Corporation to The Borden Company, and that assignments of trade-marks, patents, copyrights and leases should likewise be executed and delivered by the New York Corporation to The Borden Company [R. 116, *R. 159*]. Pursuant to such provision, and as a further part of the closing, the New York Corporation executed and delivered to The Borden Company two deeds conveying to The Borden Company the real estate constituting the manufacturing plants of the New York Corporation [Pet. Exs. 13-14, R. 119, 124, *R. 159*], and made a trade-mark assignment to The Borden Company.

Anheuser-Busch, Incorporated, at the same time, executed and delivered to The Borden Company the various guaranties and agreements called for by the proposal letter relative to deficiencies in assets, tax liabilities, competing in business, etc. [Stip. § 8, R. 53, *R. 159*].

As part of the closing, The Borden Company issued and delivered to Anheuser-Busch, Incorporated, 35,000 shares of the capital stock of The Borden Company [Stip. § 8, R. 53, 130, *R. 160*]. This stock was issued and delivered directly to Anheuser-Busch, Incorporated, instead of to the New York Corporation, pursuant to the authority of the New York Corporation given in a writing dated September 22, 1930 [Pet. Ex. 15, R. 128, *R. 160*].

The Borden Company, on the closing date, September 26, 1930, in satisfaction of the $500,000.00 indebtedness owing by the New York Corporation to Anheuser-Busch, Incorporated, issued to Anheuser-Busch, Incorporated, 2,500 shares of the capital stock of The Borden Company and paid it the sum of $300,000.00 [Stip. § 8, R. 53, R. 131, *R. 160*].

The New York Corporation was dissolved on October 6, 1930 [Pet. Ex. 2, R. 68].

On September 9, 1930, The Borden Company had caused to be organized, under the laws of Delaware, a corporation styled "Anheuser-Busch Ice Cream Company, Inc." (hereinafter sometimes referred to as the "Delaware Corporation"). On September 16, 1930, petitioner had filed with the Secretary of State of the State of New York its written consent to the use by the Delaware Corporation of its corporate name [Stip. § 9, R. 54, Pet. Ex. 19, R. 132, *R. 160*].

On September 19, 1930, the Delaware Corporation had received and accepted an offer from The Borden Company, under which the latter undertook to transfer to the Delaware Corporation, all of the assets, business and good will which The Borden Company had contracted to acquire from the New York Corporation, in consideration of the issuance of 25,000 shares of the capital stock of the Delaware

Corporation (constituting all of its then outstanding stock) to Borden's Ice Cream and Milk Company, Inc., a wholly owned subsidiary of The Borden Company [Stip. § 9, R. 54, *R. 160*].

On September 26, 1930, subsequent to the acquisition by The Borden Company of the property and assets of the New York Corporation, The Borden Company executed and delivered to its Delaware subsidiary, for a recited consideration, as above stated, a Bill of Sale [Resp. Ex. B, R. 138], transferring to it all of the assets, business and good will acquired by The Borden Company from the New York Corporation as they existed on September 26, 1930 (*R. 160-161*). The Bill of Sale was in substantially the same form as that executed by the New York Corporation, but, in addition, it recited that The Borden Company had caused the Delaware Corporation to be organized for the purpose of having it acquire from The Borden Company the assets and business of the New York Corporation (*R. 161*). It also contained a clause (R. 143) whereby, in consideration of the conveyance and transfer made, the Delaware Corporation assumed and agreed to pay all taxes payable by The Borden Company in respect of the business acquired by it from the New York Corporation, pursuant to the agreement of August 6, 1930, and all other indebtedness and liabilities whatsoever of The Borden Company in connection with the assets and business transferred, as such indebtedness and liabilities should exist at the date of the Bill of Sale (*R. 161*).

Anheuser-Busch, Incorporated, was in no way consulted by The Borden Company as to the desirability or advisability of the organization of the Delaware Corporation as the subsidiary of The Borden Company for the purpose of conducting the business. Nor was Anheuser-Busch, Incorporated, consulted as to the desirability of the proposed

conveyance by The Borden Company to the Delaware Corporation of the assets of the New York Corporation which were to be conveyed to The Borden Company (R. 134, *R. 161*).

Anheuser-Busch, Incorporated, caused the New York Corporation to execute assignments to the Delaware Corporation of its interest as lessee in two leases having a combined rental of $1,400.00 per year, and its interest in an agreement for the purveyance of ice [Stip. § 8, R. 54, *R. 160*].

Anheuser-Busch, Incorporated, filed with the Collector of Internal Revenue at St. Louis, Missouri, a consolidated income tax return for the year 1930 on behalf of itself and its subsidiaries, including the New York Corporation (R. 49).

On June 11, 1936, the Commissioner of Internal Revenue issued a deficiency letter (R. 10) addressed to Anheuser-Busch, Incorporated, in which, among other things, the Commissioner determined that there should be added to the net income of the New York Corporation for the year 1930 the sum of $300,000.00, denominated by him as "taxable gain from sale or exchange of Melrose Ice Cream Corporation's assets, computed in accordance with Section 112 (d) (2) of the Revenue Act of 1928" (R. 16).

On September 8, 1936, Anheuser-Busch, Incorporated, and the representatives of the New York Corporation filed their separate petitions for redetermination of the income tax liability of Anheuser-Busch, Incorporated, and its affiliates, for the year 1930, seeking a reversal of the Commissioner's determination with respect to said alleged taxable gain (R. 3, 193).

On October 31, 1938, the Commissioner of Internal Revenue, by amended answers, alleged that the shares of stock

in The Borden Company received in exchange for the assets of the New York Corporation, were not securities of a corporation, which was a party to the reorganization, and contended that the entire alleged gain from said transaction should be recognized (R. 23, 214).

On October 31, 1938, the cases were consolidated before the Board of Tax Appeals (R. 47, 238), and submitted upon a single Stipulation of Facts (R. 47) and briefs.

On December 14, 1939, the Board of Tax Appeals promulgated its findings of fact and opinion (R. 154) wherein it sustained the contention made by the Commissioner in his amended answers, and on February 10, 1940, it entered its decision in accordance with such opinion (R. 167).

On April 4, 1940, Anheuser-Busch, Incorporated, and the representatives of the New York Corporation filed separate petitions for review in the Circuit Court of Appeals (R. 168, 238) where the cases were again consolidated.

On November 27, 1940, the Circuit Court of Appeals rendered its opinion (R. 260) and entered its judgment and decree (R. 269) affirming the decision of the Board of Tax Appeals.

On December 12, 1940, petitioners filed their petition for rehearing (R. 271), which was on December 19, 1940, denied (R. 285).

RULINGS BELOW.

The United States Board of Tax Appeals in its opinion (R. 154, 161; 40 B. T. A. 1100) held:

(a) That the agreement between Anheuser-Busch, Incorporated, and The Borden Company contained a "plan of reorganization," within the meaning of Section 112 (i) (1) (A) of the Revenue Act of 1928.

(b) That, since The Borden Company had the privilege of organizing a subsidiary to hold the property which it acquired from the New York Corporation and did in fact convey such property to such subsidiary, the shares of stock of The Borden Company delivered in exchange for such property were not securities of a party to the reorganization of the New York Corporation, and the receipt thereof resulted in recognizable gain under Section 112 of the Revenue Act of 1928.

(c) That since no securities were received by the taxpayers free from recognition of gain or loss, the assumption by the Borden Company of the liabilities of the New York Corporation should, notwithstanding the provisions of Section 213 (f) of the Revenue Act of 1939, be considered as "other property or money" received by the taxpayers within the meaning of Section 112 of the Revenue Act of 1928.

The amount of the gain which, in conformity with the Board's opinion, was added to the consolidated income of Petitioners for 1930, to wit, $571,989.07, was derived by comparing the cost to the New York Corporation of its gross assets, to wit, $2,498,323.43 (Stip. § 10, R. 56), with the amount alleged to have been received, to wit, $2,770,-312.50, representing the market value of September 26, 1930, of 37,500 shares of stock in The Borden Company, plus $300,000.00 cash. The market value of the shares on said date was $73.875 per share.

The United States Circuit Court of Appeals, in its opinion (R. 260, 115 F. [2d] 662), sustained the Board of Tax Appeals in each one of its above-mentioned holdings. In reaching the conclusion that The Borden Company was not a party to the reorganization of the New York Corporation, the Court emphasized the fact that The Borden Company

had "in mind a plan to organize a subsidiary to take over the assets" of the New York Corporation in which it "required the taxpayer to agree to co-operate" (R. 267), and was of the opinion that, by reason of such "contemplation" of the subsidiary, the direct ownership by The Borden Company of the assets of the New York Corporation was "transitory and without real substance" (R. 268).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The United States Circuit Court of Appeals, in holding that the ownership by The Borden Company of the assets which it acquired from the New York Corporation in exchange for its stock, should be considered as "transitory and without real substance," notwithstanding the established fact that such ownership was unencumbered by any obligation to taxpayers in respect of the retention or subsequent disposal of such assets—has decided a federal question in a way probably in conflict with a principle of an applicable decision of this court in

Helvering v Bashford (1938), 302 U. S. 454,

in which this court, as we conceive, tested the substantiality of ownership in relation to whether or not it had functional or business significance independently of any other transaction.

II.

The United States Circuit Court of Appeals, in holding that the character of the exchange which took place as between the New York Corporation and The Borden Company (as one free from recognition of gain under Section

112 [b] [4] of the Revenue Act of 1928), could be altered by a subsequent disposition by The Borden Company of the assets received, rendered a decision in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in

Portland Oil Company v. Commissioner of Internal Revenue (1940), 109 F. (2d) 479, cer. den. 310 U. S. 650,

where it was in effect held that Section 112 of the Revenue Act does not require that a reorganization fully consummated shall remain in statu quo in order that tax exemption may be enjoyed.

III.

The United States Circuit Court of Appeals, in holding and deciding that The Borden Company was not a party to the reorganization of the New York Corporation, rendered a decision in direct conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in

Schuh Trading Company v. Commissioner (1938), 95 F. (2d) 404.

IV.

The United States Circuit Court of Appeals, in holding and deciding that The Borden Company was not a party to the reorganization of the New York Corporation, has decided a federal question in a way probably in conflict with the principles of applicable decisions of this court in

Groman v. Commissioner of Internal Revenue (1937), 302 U. S. 82;
Helvering v. Bashford (1938), 302 U. S. 454

in which this court, as we conceive, tested the capacity of a party as a party to a reorganization in relation to whether it was a principal or agent in the transaction.

V.

The United States Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court, viz:

Whether the tax liability of a corporation may be affected by an act done by another party, where such other party was under no obligation to the taxpayer to perform such act and it lay within the exclusive discretion of such other party whether the act would or would not be performed.

PRAYER.

For the purpose of correcting the errors complained of, and to the end that the rights of petitioners may be determined in accordance with the law, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the records and proceedings of the said Circuit Court of Appeals in the within-described consolidated causes, to wit: "Anheuser-Busch, Incorporated, v. Guy T. Helvering, Commissioner of Internal Revenue," No. 11,751 on the docket of said Court, and "Melrose Ice Cream Corporation, et al. v. Guy T. Helvering, Commissioner of Internal Revenue," No. 11,752 on the docket of said Court, to the end that the decision of said Circuit Court of Appeals in said consolidated causes may be reviewed by this court, as provided by law; that said decision of said Circuit

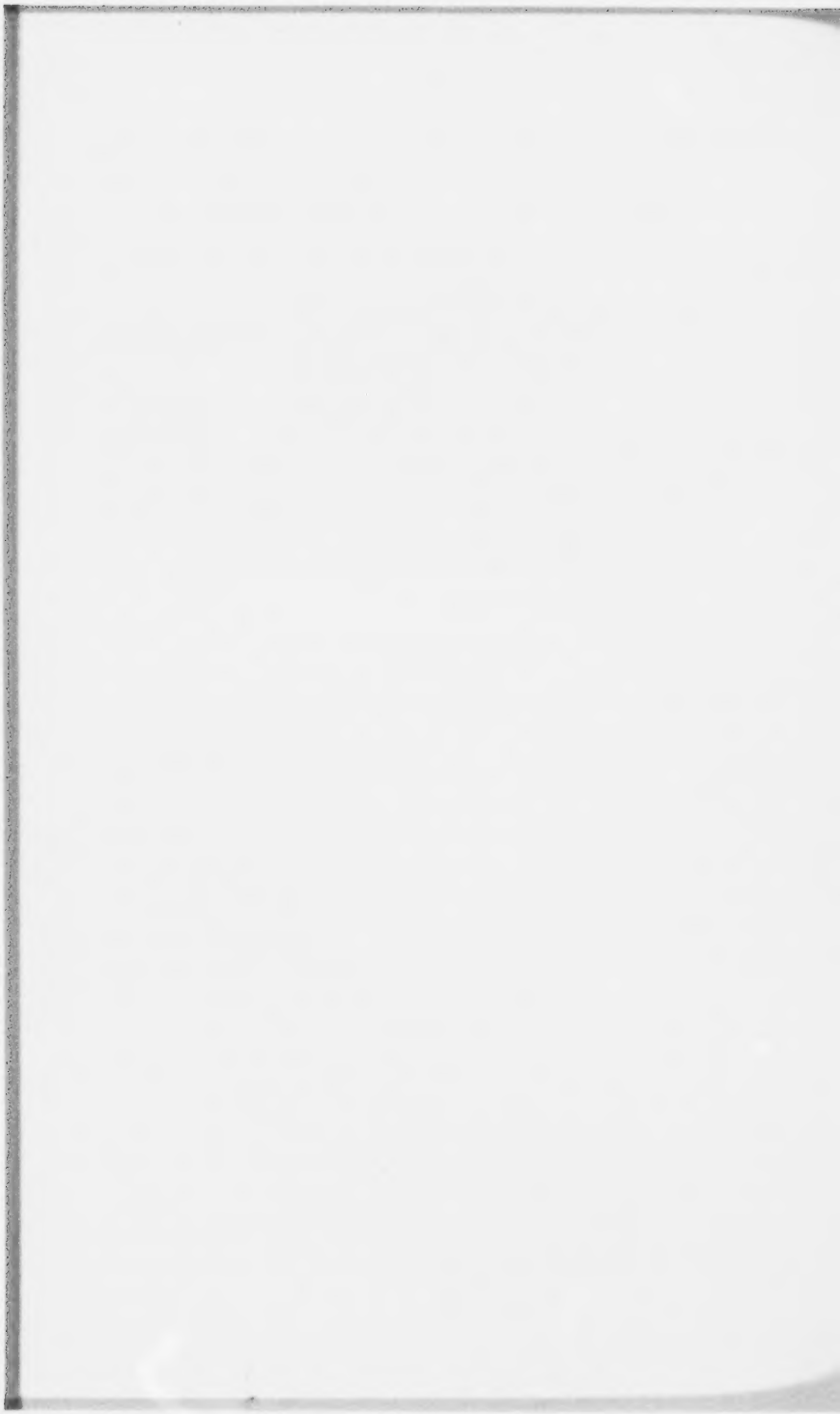
Court of Appeals may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief as to this Court may seem appropriate.

ANHEUSER-BUSCH, INCORPORATED, a Corporation;

MELROSE ICE CREAM CORPORATION, a Dissolved Corporation;

ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the Last Board of Directors, and Trustees for the Creditors and Stockholders, of said Melrose Ice Cream Corporation,

By DANIEL N. KIRBY,
ALLEN C. ORRICK,
HARRY W. KROEGER,
Attorneys for Petitioners.



SUPPORTING BRIEF.

I.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 154-167) is reported in 40 B. T. A. 1100. The opinion of the Circuit Court of Appeals (R. 260-269) is reported in 115 F. (2d) 662.

II.

JURISDICTION OF THIS COURT.

The judgment of the United States Circuit Court of Appeals was entered on November 27, 1940 (R. 269). A petition for rehearing (R. 271), filed on December 12, 1940, was entertained by said Court and denied on December 19, 1940 (R. 285). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347).

III.

STATEMENT.

A full statement of the case has been made in the petition for writ of certiorari, and in the interest of brevity is not here repeated.

IV.

SPECIFICATIONS OF ERROR.

1.

The Circuit Court of Appeals erred in holding that the vestiture of the assets of the New York Corporation in The Borden Company was transitory and without real substance.

2.

The Circuit Court of Appeals erred in holding that evidence concerning the organization by The Borden Company of a Delaware subsidiary, and concerning the conveyance by The Borden Company of the assets which it had acquired from the New York Corporation, to such Delaware subsidiary, constituted relevant, competent and material evidence upon the issue of petitioners' tax liability. (The evidence subject to objection is to be found in the Record at pages 54-55, 135-154, and the objection is to be found in the Record at pages 183-184.)

3.

The Circuit Court of Appeals erred in holding that The Borden Company was not a party to the reorganization of the New York Corporation, and that shares of stock in The Borden Company (issued in exchange for the assets of the New York Corporation) were not securities of a party to the reorganization, but were "other property," within the meaning of Section 112 of the Revenue Act of 1928.

4.

The Circuit Court of Appeals erred in failing to hold that the shares of stock in The Borden Company received in exchange for the assets of the New York Corporation were received free from recognition of gain.

5.

The Circuit Court of Appeals erred in failing to hold that Section 112 of the Revenue Act of 1928 does not make its grant of exemption in respect of securities received in exchange for property dependent upon the future retention or disposition of the property by the transferee.

6.

The Circuit Court of Appeals erred in failing to hold that the conveyance by The Borden Company to the Delaware Corporation was not in pursuance of the plan of reorganization of the New York Corporation, but was a subsequent transaction which was not required by the plan, which lay within the exclusive control of The Borden Company, and which should in no wise affect the tax liability of petitioners.

7.

The Circuit Court of Appeals erred in failing to hold, in conformity with subsection (f) of Section 213 of the Revenue Act of 1939, that the assumption by The Borden Company of the indebtedness of the New York Corporation to petitioner, Anheuser-Busch, Incorporated, was not to be considered as "other property or money," within the meaning of Section 112 of the Revenue Act of 1928, so as to result in recognizable and taxable gain to the extent thereof.

V.

ARGUMENT.

It has been conceded that the exchange of the assets of the New York Corporation for shares of stock in The Borden Company would have constituted a reorganization [with the result that such shares would have been received free from recognition of gain under Section 112 (b) (4)], if The Borden Company had retained such assets, instead of transferring them in turn to its Delaware subsidiary. The Board of Tax Appeals proceeded upon the assumption that "the agreement between Anheuser-Busch (petitioner) and Borden contained a 'plan of reorganization' within the meaning of Section 112 (i) (1) (A) of the Revenue Act of 1928" (R. 161). The Circuit Court of Appeals proceeded upon the same assumption.

The issues in the case, therefore, turn upon the effect of the subsequent conveyance by The Borden Company, of the assets which it had acquired from the New York Corporation, to the Delaware subsidiary of The Borden Company. Briefly stated, the primary issue is whether The Borden Company, by divesting itself of the assets, also divested itself of its character as a party to the reorganization within the meaning of Section 112 (b) (4).

As a preliminary to the argument in support of the reasons for the granting of a writ of certiorari, we find it necessary to emphasize certain facts. These are largely of a negative character, but stand uncontroverted.

There is not presented in this case any contention that taxpayers caused the property to be transferred to The Borden Company as a step or device in the accomplishment of any ulterior purpose entertained by them. Neither the Board nor the court undertook to find such a purpose.

In conveying the assets to The Borden Company, the taxpayers merely rendered the property unto the corporation which proposed to acquire it and which gave the consideration therefor. Neither did the Government charge, nor the Board or Court find, that any purpose of the taxpayers was subserved by the ultimate vestiture of the assets in the Delaware subsidiary which would not have been fully subserved, had The Borden Company retained the assets, and which was not in fact fully subserved when the assets were conveyed to The Borden Company.

It is freely acknowledged that the taxpayers knew at the time of the consummation of the transaction that The Borden Company intended to vest the assets in a subsidiary, and it is freely acknowledged that Anheuser-Busch, Incorporated, co-operated in the fulfillment of such intent to the extent of enabling The Borden Company's subsidiary to use a name similar to that of the transferring corporation. But it should be understood as an established fact, not controverted by any finding of the Board or the Court, that The Borden Company was not obligated to taxpayers by any stipulation of the plan of reorganization in respect to its management or disposal of the property, and taxpayers were not in any way consulted, excepting in connection with the use of the corporate name, concerning any act taken by The Borden Company with respect to its subsidiary (*R. 161*).

POINT 1.

(In Support of Reason for Allowance I.)

In holding that the ownership of the assets by The Borden Company should be considered as "transitory and without real substance" and that therefore The Borden Company should be treated as not being a party to the re-organization, the Circuit Court of Appeals reached a

conclusion probably in conflict with a principle announced in *Helvering v. Bashford* (1938), 302 U. S. 454.

In *Helvering v. Bashford* the Atlas Company entered into agreements with the stockholders of three independent companies, Peerless, Union and Black Diamond, under which they were to be consolidated into a new company, Peerless-Union. The stockholders of the old companies were to receive for their stock in the old companies, stock in the new company, stock in Atlas, and some cash. Atlas, on its part, was to furnish the new company with sufficient cash and sufficient shares of its own common stock and preferred stock to complete the transaction, in return for which it was to receive sufficient common and preferred stock in the new company to assure its control. According to the stipulation of the parties in that case (Transcript of the Record pp. 19-22) the Atlas stock and the cash were delivered by Atlas to Peerless-Union for a consideration consisting of preferred stock and 57 per cent of the common stock of Peerless-Union. It was under these circumstances that this Court held that Atlas was merely the efficient agent in bringing about a reorganization of its competitors into a new company.

The vestiture which this Court described as "transitory and without real substance" was the mere passing of share certificates from stockholders of the old companies to the new company through the hands of the agents of Atlas. The taxpayer had contended, contrary to the record, that Atlas had acquired the shares of Peerless and of Union in direct exchanges with their stockholders. The Government had contended that the right of the agents of Atlas to receive shares of stock in the old companies was restricted to their agency to receive them for the new corporation. This contention of the Government was the contention that this Court sustained.

More recently in *Pearson v. McGraw* (1939), 308 U. S. 313, this Court more clearly defined the circumstances under which a series of acts, each having some independent significance in the property law, may be treated, from the standpoint of the tax law, as in substance steps in one transaction. The test there established was whether an act had "functional or business significance," or whether it had "meaning and significance only in relation to" a subsequent act (308 U. S., at p. 317).

The case here presented, when its established and recognized facts are subjected to the tests applied in *Helvering v. Bashford* and *Pearson v. McGraw*, will be found, it is submitted, to lie outside the principle of those cases. When the New York Corporation conveyed its assets to The Borden Company, the latter was under no obligation to taxpayers in respect of whether such assets should be retained or transferred, or if transferred, in respect of the persons to whom and terms upon which such transfer should be made. The Borden Company was, by such conveyance, vested with the complete domination and control over the assets. It was not a "mere conduit," but a reservoir, and the vestiture of the assets in it had "meaning and significance" quite apart from anything which occurred subsequently. By the subsequent conveyance which The Borden Company made to its subsidiary, no purpose of the taxpayer was accomplished which had not already been accomplished.

In asserting that the Circuit Court of Appeals went beyond the rule of *Helvering v. Bashford* and rendered a decision contrary to the implications of that rule, we are not unmindful of the statements of the Board of Tax Appeals (R. 165) and of the Circuit Court of Appeals (R. 268) to the effect that the plan of reorganization "contemplated" the Delaware subsidiary, but such statement must

be read in context with the undisputed facts. As was said by the Board of Tax Appeals (R. 163), the taxpayers had "no voice in the decision that the property was to be received and held by Delaware rather than by Borden." This may be amplified by recourse to the stipulation of facts which discloses: that the agreement of reorganization (R. 79) neither defined the capitalization of the Delaware Corporation, nor specified the assets to be conveyed to it, nor fixed the terms and conditions upon which any such conveyance should be made; that no other instrument or agreement, written or oral, to which either of the taxpayers were parties, defined such capitalization, assets, terms or conditions, and that none of the documents or details relating to the Delaware Corporation were shown to or submitted for the approval of the taxpayers (R. 134, *R. 163*). It thus appears that the proceedings relating to the Delaware Corporation did not depend in the slightest degree upon the agreement or act of the taxpayers, and that under the plan of reorganization the subsequent conveyance to the Delaware Corporation was not only not essential, but was not even defined in terms sufficient to render it enforceable.

POINT 2.

(In Support of Reason for Allowance II.)

The Circuit Court of Appeals, in holding that the character of the exchange between the New York Corporation and The Borden Company (as one free from recognition of gain under Section 112 (b) (4) of the Revenue Act of 1928) could be altered by a subsequent conveyance by The Borden Company to its Delaware subsidiary, rendered a decision in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Portland Oil Company v. Commissioner of Internal Revenue* (1940), 109 F. (2d) 479, cer. den. 310 U. S. 650.

In the Portland Oil Company case, one of the questions in the case was whether, upon a transfer of an installment contract by Bu-Vi-Bar Corporation to the petitioner in exchange for stock, gain should be recognized, or whether the transfer should be treated as tax free so that the basis of the installment contract in the hands of Bu-Vi-Bar became its basis in the hands of petitioner. The case arose under Section 112 (b) (5) of the Revenue Act of 1928 relating to transfers to a corporation controlled by the transferor. It was urged that the transaction of exchange should be linked with prearranged transfers of stock immediately thereafter made which resulted in a destruction of the control of petitioner by the transferors of the property. The court rejected the contention, holding (109 F. [2d], at p. 489) that Section 112 (b) (5) did not require control to "remain" in the transferors, and that the "statutory reason for nonrecognition of gain or loss" in a given exchange was "fully satisfied," if, upon the completion of the exchange, the transferors were in control of the acquiring corporation, although immediately thereafter they disposed of such control.

It thus appears that the Circuit Court of Appeals for the First Circuit decided that the character of an exchange (as one free from recognition of gain or loss) is not altered by a subsequent, even though prearranged, transfer, made by one of the parties thereto, while the Circuit Court of Appeals for the Eighth Circuit in the instant case, by holding that the exemption conferred by Section 112 was destroyed when The Borden Company, at its own volition, disposed of the assets conveyed, reached a contrary decision.

In this connection it should be kept in mind that no transactions, definable as an exchange, took place between the New York Corporation and the Delaware Corporation.

The Delaware Corporation never owned or acquired a legal right to the Borden shares which passed as the equivalent of the property transferred to The Borden Company. For the passing of the assets to The Borden Company there was one consideration, consisting of Borden shares, having a definite market value. For the passing of the assets from The Borden Company to its Delaware subsidiary, there might, so far as the plan of reorganization was concerned, or so far as any agreement with the taxpayers was concerned, have been a consideration of any nature or of an entirely different value. The only exchange in which the taxpayers participated was with The Borden Company, and that exchange, standing by itself, is conceded to have been of such kind as fell within Subsection (b) (4) of Section 112 of the Revenue Act of 1928.

Closely interrelated with the question whether the character of an exchange, which, standing alone, would enjoy the benefit of the statutory exemption, is altered by a subsequent conveyance by one of the parties thereto, is the question whether such subsequent conveyance would have any effect in the application of the "continuity of interest" rule, which requires that a corporation transferring property, in order to enjoy the exemption, must acquire a definite and substantial interest in the affairs of the transferee corporation. *Helvering v. Minnesota Tea Company* (1935), 296 U. S. 378; *Letulle v. Scofield* (1940), 308 U. S. 415. Such requisite "continuity of interest" is, however, held clearly to exist where the transferor receives stock in the transferee—participation in the management of, and acquisition of a controlling interest in, the transferee corporation not being requisite. *John A. Nelson Company v. Helvering* (1935), 296 U. S. 374. As we conceive the "continuity of interest" test, however, it is to be applied only to such a transaction as may be held to constitute an "exchange" within the meaning of the statute. If this be

true, the solution of this case depends upon the relevancy of the conveyance made by The Borden Company to its subsidiary, for if that conveyance be irrelevant, it cannot be denied that the exchange as between taxpayers and The Borden Company fully complied with the "continuity of interest" test.

POINT 3.

(In Support of Reason for Allowance III.)

The United States Circuit Court of Appeals, in holding and deciding that The Borden Company was not a party to the reorganization of the New York Corporation, rendered a decision which is in direct conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Schuh Trading Company v. Commissioner of Internal Revenue* (1938), 95 F. (2d) 404.

In the Schuh Trading Company case the corporate taxpayer had agreed to transfer property (held to constitute "substantially all" of its assets) to McKesson & Robbins, Inc., or its nominee, in exchange for shares of common stock and shares of preferred stock of McKesson & Robbins, Inc., and a small amount of cash. The transfer was, in fact, made to a wholly owned subsidiary of McKesson & Robbins, Inc. The court held that the transaction was a reorganization within the meaning of the statute, to which McKesson & Robbins, Inc., was a party, and that no gain was to be recognized upon the transfer of the assets, notwithstanding the fact that they were conveyed to a nominee. The court said (l. c. 411):

> "The exchange was between Schuh Drug Company and its shareholders on the one hand and McKesson & Robbins on the other, and if the latter had some reason for directing that the conveyance be made to its agent or representative, nominee, or grantee, that was no concern of the petitioners. Clearly, under the evidence

in this case, McKesson & Robbins was a party to the reorganization."

If stock received in exchange for property is received tax free, although, for its own convenience, the corporation entitled to the property elects to take title in a subsidiary, *a fortiori* stock received in exchange for property, which is actually conveyed to the corporation issuing the stock, would be received tax free, although subsequently the transferee corporation, for its own convenience, reposes the assets in a subsidiary. Hence, the decision in the instant case is in direct conflict with that of the Circuit Court of Appeals for the Seventh Circuit.

POINT 4.

(In Support of Reason for Allowance IV.)

The Circuit Court of Appeals in holding that The Borden Company was not a party to the reorganization of the New York Corporation rendered a decision which is probably in conflict with a principle established by this Court in *Groman v. Commissioner of Internal Revenue* (1937), 302 U. S. 82, and *Helvering v. Bashford* (1938), 302 U. S. 454.

In both of those cases this court decided that a parent corporation contracting for exchanges as between stockholders of independent companies and its own subsidiary, was not a party to the reorganization, because it acted, not as principal in, but as the efficient agent in bringing about, the reorganization.

Since The Borden Company in the instant case, not only acquired the legal title to the assets, but upon such acquisition had full power of control over them, without any obligation to taxpayers in respect of their subsequent retention or disposal, it was contended that The Borden Company was a principal in the deal. The denial of this contention (R. 267) by the Circuit Court of Appeals, ren-

ders its decision in the instant case in probable conflict with the above mentioned decisions of this Court in respect of the proper test to be applied in ascertaining whether or not a corporation is a party to a reorganization.

POINT 5.

(In Support of Reason for Allowance V.)

The Circuit Court of Appeals, in holding in effect that the tax liability of petitioners could be altered by the performance or nonperformance by The Borden Company of an act lying within its exclusive discretion and control, has decided an important question of federal law which has not been but should be decided by this court.

It is conceded in this case, that no tax would have been imposed in respect of any gain arising from the exchange of the assets of the New York Corporation for shares in The Borden Company, if The Borden Company had retained the assets. It is an undisputed proposition that The Borden Company would have violated no obligation to taxpayers had it retained the property, or had it made a disposal thereof (at a profit or loss to itself) in a different manner and upon different terms and conditions, instead of reposing the property in a subsidiary. Therefore, it is clear that the issue of tax or no tax is made to depend, not upon what the taxpayers did or received, but upon what The Borden Company, of its own unrestricted volition, did. Whether such a tax is unreasonable and confiscatory, because imposed by reason of an event having no relation to the financial experience of taxpayers, is an important question not heretofore settled by this Court.

SUMMARY.

The conflict between the decision of the Circuit Court of Appeals in the instant case and the decisions of other Circuit Courts of Appeals in the cases herein above cited,

the probable conflict of the principles applied by the Circuit Court of Appeals in the instant case with principles established by this Court in *Groman v. Commissioner*, and *Helvering v. Bashford*, supra, and the introduction by the Circuit Court of Appeals into the tax law of a novel principle that a corporation may be taxed because of what another corporation did or did not do, are relied upon to call for this Court's exercise of its power of supervision.

No point has been made in this argument concerning the assumption of indebtedness issue involved in the case, because it has been conceded (R. 269) that the solution of that issue depends upon the solution of the issue whether The Borden Company was or was not a party to the reorganization.

Respectfully submitted,

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